



Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30-40-50, 235; 240;and 300
Regulation title	Eligibility Conditions and Requirements
Action title	Resources and Transfers
Date this document prepared	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

This regulatory action is to clarify and augment the existing regulations regarding restrictions on transfer of assets and the treatment of certain resources that may be counted in the process of Medicaid eligibility determination. These regulatory changes are needed to close loopholes that currently allow individuals to shelter resources in excess of the Medicaid limits.

The current regulations are being used by individuals to dispose of or temporarily limit access to their resources with the intent of establishing eligibility for Virginia Medicaid. This regulatory action will require individuals who have taken steps to limit their access to their own resources while maintaining ownership to make all reasonable efforts to access those resources prior to establishing Medicaid eligibility. This change will limit the responsibility of the Medicaid program to consider or pay for long-term care expenses incurred during a period of ineligibility for Medicaid payment for long-term care services.

DMAS proposes to amend the following sections of the regulations as follows:

- 12VAC30-40-50 and 12VAC30-40-235 to clarify that those medical or remedial expenses incurred during a transfer of assets penalty period shall not be allowed as a deduction in the post-eligibility patient pay calculations.
- 12VAC30-40-240 to clarify that current market or fair market value of real property is 100 percent of the tax assessed value and to require holders of savings bonds to make all reasonable efforts

to liquidate savings bonds during the mandatory retention period so that they may be used to pay for medical care.

- 12VAC30-40-300 to add language to state that multiple, fractional, uncompensated transfers of assets will be treated as one transfer in determining the period of ineligibility.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

The purpose of this regulatory action is to clarify and augment the existing regulations regarding restrictions on transfers of assets and the treatment of certain resources that may be counted in the process of Medicaid eligibility determination. The Department of Medical Assistance Services (DMAS) has determined that the proposed regulatory action will protect the health, safety, and welfare of the citizens of the Commonwealth by strengthening Medicaid policies to ensure the fiscal integrity of the Medicaid program as well as reserving funds for payment of services for individuals who meet the eligibility requirements for the Medicaid program. This action is necessary to ensure that Medicaid funds are reserved for eligible individuals who meet established criteria for payment of their incurred medical expenses.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The sections of the State Plan for Medical Assistance that are affected by this action are Eligibility Conditions and Requirements; Medical Expenses, Resources and Transfers (12VAC30-40-50, 235, 240, and 300).

DMAS proposes to amend the following sections of the regulations as follows:

- 12VAC30-40-50 and 12VAC30-40-235 to clarify that those medical or remedial expenses incurred during a transfer of assets penalty period shall not be allowed as a deduction in the post-eligibility patient pay calculations.
- 12VAC30-40-240 to clarify that current market or fair market value of real property is 100 percent of the tax assessed value and to require holders of savings bonds to make all reasonable efforts to liquidate savings bonds during the mandatory retention period.
- 12VAC30-40-300 to add language to state that multiple, fractional, uncompensated transfers of assets will be treated as one transfer in determining the period of ineligibility.

The current regulations for 12VAC30-40-50 and 12VAC30-40-235 specify medical expenses and reasonable limits on amounts for necessary medical and remedial care not covered under Medicaid. The proposed regulatory action adds to 12VAC30-40-50 that medical and remedial care expenses incurred as a result of imposition of a transfer of assets penalty period shall not be allowed as a deduction in the post-eligibility patient pay calculation. The proposed change for 12VAC 30-40-235 stipulates that there shall be no deduction allowed in the patient pay calculation for medical and remedial care expenses that were incurred during a period of ineligibility for Medicaid payment of long-term care services due to the imposition of a transfer of assets penalty period.

12VAC30-40-240 currently specifies that the market value of real property is determined by simply ascertaining the tax assessed value of the property and applying to it the local assessment rate. The planned action specifically clarifies that the current market value of real property is 100 percent of the tax assessed value. In addition, this section also specifies that bonds are assets which can be liquidated and are considered resources that may be used to pay for medical care. The proposed regulatory action requires that holders of savings bonds must make all reasonable efforts to liquidate savings bonds, including seeking a hardship waiver from the United States Treasury during the minimum retention period so that the proceeds may be used to pay for medical services. Upon verification that the bond cannot be liquidated, the bonds will be considered an available resource following the expiration of the minimum retention period. Once the minimum retention period expires, the inability to obtain a hardship waiver will not be the basis for excluding new bond purchases or for excluding other assets purchased with the proceeds from the savings bonds.

Currently 12VAC30-40-300 provides procedures applicable to all transfers of resources and specifies that the period of ineligibility begins on the first day of the first month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State Plan and would otherwise be receiving Medicaid-covered institutional level care based on an approved application for such care but for the application of the penalty period, whichever is later, and does not occur in any other period of ineligibility under this section. The ineligibility period is equal to but shall not exceed the number of months, including any fractional portion of a month derived by dividing the total, cumulative uncompensated value of all assets transferred on or after the look-back date specified. The proposed regulatory action stipulates that in the event an individual or the individual's spouse makes multiple fractional transfers in more than one month for less than fair market value on or after the look-back date, the total cumulative uncompensated value of all assets transferred during all months will be treated as one transfer in determining the period of ineligibility. This proposed change is an option specified in the Deficit Reduction Act of 2005 (DRA).

These actions should close loopholes and limit strategies that are currently used by individuals to dispose of or temporarily limit access to their resources with the intent of establishing eligibility for Virginia Medicaid. This regulatory action will require individuals who have taken steps to limit their access to resources while maintaining ownership to make all reasonable efforts to access those resources prior to establishing Medicaid eligibility. This change will also limit the responsibility of the Medicaid program to consider or pay for long-term care expenses incurred during a penalty period of ineligibility for Medicaid payment for long-term care services.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The current regulations contain loopholes that are being used by citizens who do not want to use their own assets and resources to pay for their own medical care. Such citizens are sheltering their assets and resources and instead qualifying for public expenditures for their needed medical care through Medicaid eligibility.

Legal aid societies and other entities, such as elder law attorneys, are not expected to support these proposed changes. These organizations advocate on behalf of all persons wishing to obtain eligibility for Medicaid services, particularly long-term care services, such as nursing facility care. Nursing facility care costs DMAS in excess of \$45,000 per year for one individual.

This high cost, when combined with the graying of the American population, makes it even more important for middle income citizens to fairly participate in the costs of their long term care services.

The primary advantage of this regulatory change will be to close these loopholes that will allow individuals to shelter resources in excess of the Medicaid limits in order to ensure that Medicaid funds are reserved for eligible individuals who meet established criteria for payment of their incurred medical expenses.

The Department sees no disadvantages for the public or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no requirements in these proposed changes that are more restrictive than allowed by federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities that are particularly affected as these changes will be implemented statewide.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) other alternatives to this proposal, and 3) potential impacts of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Lois Gray, Regulatory Coordinator, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, Virginia 23219; telephone: (804)371-4300; fax: (804)786-1680; and email to: lois.gray@dmas.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public hearing will not be held.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	There are no additional funds required for the implementation of these changes/clarifications as evaluating resources, calculating patient pay, and determining asset transfer penalty periods are currently part of the Medicaid eligibility process.
Projected cost of the regulation on localities	There is no cost to localities to implement these changes/clarifications.
Description of the individuals, businesses or other entities likely to be affected by the regulation	Medicaid applicants/recipients and local department of social services eligibility staff
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	It is unknown at this time how many people will be affected; this action is limited to Medicaid applicants/recipients whose resources must be evaluated during the eligibility determination process. There are no small businesses affected by this regulation.
All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.	Individuals may have to pay for some of their long-term care costs prior to relying on Medicaid to pay the costs.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no viable alternatives to this proposed regulatory action. If these regulatory changes are not made, individuals who have assets that could be used to pay for their medical services will continue to be able to shelter their assets to establish and meet Medicaid eligibility requirements, thereby resulting in scarce public dollars being used to pay for their medical services when they could afford to pay for it themselves.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

This regulatory action closes loopholes utilized by individuals who have resources that could be used to help pay for their medical expenses, but who instead choose to shelter or make unavailable these resources and depend on the Medicaid Program to pay for their medical and/or remedial services.

The alternative is for the Medicaid Program to continue to pay for the medical expenses of individuals who have assets, but have taken steps to shelter them.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

DMAS' Notice of Intended Regulatory Action was published in the July 7, 2008, *Virginia Register* (VR 24:22) for its public comment period from July 7, 2008, to August 6, 2008. No comments were received.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and

one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income or resources depending upon which provider the recipient chooses for the item or service prescribed.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12VAC 30-40-50		Medical expenses are those medical expenses not subject to payment by a third party including (a) health insurance premiums, deductibles and co-insurance charges, and (b) necessary medical or remedial care not covered under the Medicaid plan.	Provides that medical or remedial care expenses incurred as a result of the imposition of a penalty period shall not be allowed as a deduction in the post-eligibility patient pay calculation. This addition ensures Medicaid funds will not be used to reduce the impact of the mandatory penalty period based on an uncompensated transfer of assets.
12VAC 30-40-235		Sets reasonable limits on amounts for medical or remedial care not covered under Medicaid. The maximum amount that can be deducted in the patient pay calculation is the maximum amount permitted by Medicaid or Medicare for the same non-covered items or services.	Eliminates deduction for medical expenses incurred during an asset transfer penalty period.
12VAC30-40-240		For real property the current market value of real property is determined by ascertaining the tax assessed value and applying it to the local	Clarifies that the current market value is 100% of the tax assessed value. All localities in Virginia tax at 100% of value rather than a local assessment rate or a percentage of the value.

		<p>assessment rate.</p> <p>For personal property, savings bonds are assets that are considered resources</p>	<p>Individuals are required to request a hardship waiver to liquidate bonds during the 12 month mandatory retention period. If hardship is granted, then bond is a countable resource.</p>
<p>12VAC-30-40-300 F.</p>		<p>Current regulations do not address the handling of multiple fractional, uncompensated transfers of assets.</p>	<p>Language is added to state that multiple, fractional, uncompensated transfers of assets will be treated as one transfer and a single period of ineligibility will be calculated. The DRA prohibits States from rounding down or disregarding fractional periods of ineligibility and gives the States the option to combine multiple transfers for less than fair market value into a single penalty period rather than multiple penalty periods.</p>